SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 84.

WESLEY E. TRAVIS, APPELLANT,

vs.

THE UNITED STATES.

BRIEF ON BEHALF OF APPELLANT.

STATEMENT OF CASE.

The *facts* in this case are few and simple, and, briefly, are:

1. September 15, 1896, appellee advertised for proposals for transporting the mails on route No. 404,011 at Boston, Mass., for the term July 1, 1897, to June 30, 1901, being the covered screen-wagon mail station service; appellant submitted proposal to perform the service for the period named for the sum of $3,780 per annum; his bid was accepted by appellee, award of contract made to him December 21, 1896, and contract in writing, dated on said last-named day, was entered into between the parties, with sureties, for the performance of the service during the period aforesaid, and the contract was duly approved and accepted by appellee (*R.*, *3-4*).

2. Appellant made all necessary arrangements preparatory to the performance of the service, and, in that behalf, expended the sum of $500; and he was at all times able, ready,

and willing to perform the service under the contract, and so repeatedly tendered himself to appellee, but was by it prevented from performing (*R.*, *8*).

3. The service under the contract covered 28,886 miles per annum, but before the date upon which, under the contract, appellant was to commence the performance of service, appellee, in order to expedite the mails, determined to dispatch certain thereof upon the electric street cars, instead of upon the wagons, and thus *decreased* the service so that it embraced but 23,088 miles per annum—

> "being a decrease merely in the quantity and volume of service required to be performed of 5,798 miles per annum, or a decrease of 20 per cent. from the annual mileage embraced in and called for by the said advertisement" (*R.*, *8*, *14*).

4. Thereupon, and because of said decrease in quantity and volume of service required, and not because of any neglect or default of appellant in the performance thereof, appellee undertook to discontinue the contract aforesaid, under the alleged authority of the contract itself, in that regard; and, thereafter, re-advertised and relet the same service, so decreased, as above, and covering the same period, to another contractor, for the sum of $2,475, per annum (*R*, *8*, *14*).

5. The difference between the amount it would have cost appellant to perform the service and the contract price therefor, during the contract period, is the sum of $5,500 (*R.*, *9*).

6. Appellant filed petition and suit in the Court of Claims, based upon the foregoing *facts*, which were proven, and, thereafter, found by that court; and said petition was dismissed, upon the ground that the arbitrary action of defendant was reserved to it as a right and privilege under the contract.

7. From that judgment, the present appeal was taken.

ASSIGNMENT OF ERRORS.

The court below *erred:*

1. In holding that the Postmaster General had, under the facts found, the legal right to terminate and discontinue the contract of appellant.

2. In failing to enter judgment for appellant in the sum of $5,500, being the amount of loss sustained by him by reason of the breach of contract by appellee.

3. In dismissing the petition of appellant, and entering judgment in favor of appellee.

BRIEF.

I.

THE CONTRACT PROVISIONS ARE TO BE TESTED AND APPLIED BY THE SAME RULES OF LAW, AND GOVERNED BY THE SAME DECISIONS, AS IF ENTERED INTO BETWEEN INDIVIDUALS.

This case presents for determination the single question whether, under the above facts, the Postmaster General had the right to arbitrarily discontinue the contract.

In order to properly determine that question, it will be useful to first consider the relative rights of the contracting parties.

The contract is to be tested by precisely the same rules of law, and governed by the same decisions, as if it had been entered into between individuals. No special privileges and rights are conferred by law in favor of one party to such contract simply because that one party happens to be the Government. This principle has been frequently affirmed.

For example, in the case of Gilbert (*1 Ct. Cls., 28, 37*), speaking of the reciprocal rights and obligations in the case of contracts between an individual and the Government, it was stated:

> "We can see no good reason for adopting any different rule in regard to these contracts, to which the United States is a party, than is applied to those between man and man."

In the case of Curtis (*2 id., 144, 152*), the opinion states:

> "The rule and principles adopted by this court for the administration of justice between a claimant and the Government is simply to give that measure of relief which the law would award were the action between man and man. The court never gives greater

> and never gives discretionary relief. * * * But the liability of the Government in these cases on contract, express or implied, has been held, generally, to be simply that which a claimant might pursue against another defendant in another tribunal."

The same thing was reaffirmed in the case of Brooke (*id., 180–184*).

Again, in the case of Southern Pacific Railroad Co. (*28 id., 77, 105*), it is thus stated in the opinion :

> "We understand the law to be that, 'when a government enters into a contract with an individual, 'it deposes, as to the matter of the contract, its constitutional authority, and exchanges the character of 'a legislator for that of a moral agent, with the same 'rights and obligations as an individual,' (3 Hamilton's Works, 518; U. S. *v.* Bank of Metropolis, 15 Pet., 392; Deming *v.* United States, 1 C. Cls. R., 191). If there are exceptions to the rule just stated, they do not apply to this action."

So, also, in the case of Starin (*31 id., 65, 85*), the court reaffirmed the same doctrine (citing Hull *vs.* Wisconsin, *103 U. S., 5*, and Davis *vs.* Gray, *16 Wall., 203*).

See, also, same thing in the case of Smoot (*15 Wall., 36*).

And in the case of Railway Co. *vs.* United States (*104 U. S., 680, 685*), this court expressly affirmed the doctrine, where in respect of a mail contract, it stated :

> "The contracts * * * were expressly authorized by law. They were, therefore, valid and binding on the United States as well as upon the railroad company. * * * The United States would have been liable to damages for its breach, on the same principles and to the same extent as a private party, for which a suitable remedy was provided by law in the jurisdiction conferred upon the Court of Claims. In this respect, the relation between the parties was that of perfect equality in right."

Without further citation of authority, it may be said to be settled beyond question that the same principles must be applied in this case as would be applied had the contract been entered into between individuals.

Therefore, the only rights reserved to appellee, and upon which it may rely in respect of the enforcement or attempted discontinuance of the contract, must be found, if at all, in the contract itself, or in the law governing the same.

In this connection, it may be remarked, in passing, that the only exception to the rule above stated is in respect of contracts entered into by the United States, by and through its agents, in the absence of lawful authority; and, in such cases, it is held that the United States is not bound by the ordinary rules of agency:

McElrath (*12 Ct. Cl., 201, 216*).
Whiteside (*93 U. S., 247*).
Pine River Logging Co. (*186 id., 279, 291*).

Here the contract was entered into in pursuance of lawful authority, and the only question involved is as to the relative rights of the contracting parties, as found in the contract itself, or in the law governing it.

II.

PROVISIONS OF THE CONTRACT.

Before considering specifically the exact provisions of the contract, as well the law properly applicable thereto, it must be borne in mind that the contract absolutely required appellant to perform the certain mail service therein referred to, for the compensation therein fixed, and for the full term of four years.

The position of appellee, sustained by the court below, is, that while appellant's obligation to perform was absolute,

appellee was bound only to the extent and for such period as suited its sovereign will and pleasure.

If that contention be sound, then there is presented the most extraordinary and unusual condition of a contract absolutely binding and *obligatory* upon the one party for the full term thereof; and yet *discretionary* as to the other, the right being reserved to such other to arbitrarily terminate the contract at any time during its term.

Such an one-sided agreement is so utterly repugnant to the fundamental theory of contracts that the right so asserted must be found, if at all, in the contract itself, since no such right or privilege will be presumed or inferred in favor of one party to an agreement, while the other party thereto remains bound. That no such reservation or right is contained in the contract is apparent from a mere reading thereof.

The "Instructions to bidders," accompanying the "Advertisement for proposals" (and by reference made part of the contract), contained the following provision:

> "There will be no diminution of compensation for partial discontinuance of service, or increase of compensation for new, additional, or changed service that may be ordered during the contract term; but the Postmaster General may discontinue the entire service on any route whenever the public interest, in his judgment, shall require such discontinuance, he allowing, as full indemnity to the contractor, one month's extra pay" (*R.*, *14*).

The contract obligated the contractor to carry the mails, during the period named, in covered screen wagons, for the service covered by the advertisement for proposals, and

> "for all new or additional service of said kind which may, at any time during the term of this contract, be required in said city, at $3,780 per year" (*R.*, *5*).

The contract contained the following, further, provisions:

> "*Tenth.* To perform all new or additional or changed covered screen wagon mail station service that the Postmaster General may order at the city of Boston, Mass., during the contract term, without additional compensation, whether caused by change of location of post-office, stations, landing, or the establishment of others than those existing at the date hereof, or rendered necessary, in the judgment of the Postmaster General, for any cause, and to furnish such advance wagons or extra wagons from time to time for special or advance trips as the Postmaster General may require, as a part of such new or additional service.
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> * * * * * * *
>
> "It is hereby stipulated and agreed by the said contractor and his sureties that the Postmaster General may change the schedule and termini of the route, vary the routes, increase, decrease, or extend the service thereon, without change of pay; and that the Postmaster General may discontinue the entire service whenever the public interest, in his judgment, shall require such discontinuance; but for a total discontinuance of service the contractor shall be allowed one month's extra pay as full indemnity" (*R.*, *6–7*).

It further provided that the contract might be *annulled*, for certain reasons specifically enumerated (*R.*, *7*); but those provisions are here unimportant, inasmuch as the fact is, and the court below so found, that the "order to discontinue "said service under claimant's contract was not made on ac- "count of any neglect or default" on his part (*R.*, *8–9*).

III.

THE ACTION OF THE GOVERNMENT IN THIS CASE CONSTITUTED A BREACH OF ITS CONTRACT WITH APPELLANT.

As above shown, the contract absolutely bound the contractor to perform, without additional compensation, all such new, additional, or changed, increased or extended, service as might be required of him during the contract term; and, on the other hand, it bound the United States to pay to the contractor the agreed rate of compensation, even should the service be decreased during the contract term.

Thus, according to the very letter of the contract, both parties were placed on an equal footing, and each took the risk and chance of a change in the amount of service required, be it an increase or a decrease, during the entire term, without any change in the amount of compensation to be paid by the one and received by the other.

The wording of the contract is so exceedingly plain and free from all ambiguity that it would hardly seem to admit of serious argument in support of a contention so utterly in defiance of and in direct conflict with its said provisions, as one that seeks to impose upon the contractor the obligation to perform the service, even if increased or extended, without additional compensation; and yet permits the United States to break the contract because the volume of service happens to be decreased, and some other contractor is willing to perform the decreased service at a lower price.

How can it be possible, under this contract, to hold the contractor to a performance of a 20 per cent. *increase* of service, without increase of pay, and yet, at the same time, relieve the United States of its contract obligation simply because the required service was *decreased* 20 per cent.?

Had the conditions been reversed and the mail service *increased* 20 per cent., instead of decreased 20 per cent., can

there be any question that the contractor would have been compelled to perform the increased service without additional compensation?

Clearly not; no such contention is asserted by either party to this suit; and, if it were, it would be utterly untenable, not only under the express provisions of the contract, but under the repeated decisions of the lower court, in other cases involving similar contracts for carrying the mails, containing the identical provisions hereinabove quoted.

Otis (*20 Ct. Cl., 315, 328;* S. C., affirmed, *120 U. S., 115*).
Knox, ex'r (*30 Ct. Cl., 59, 76–7*).
Woolverton (*34 id., 247, 268–9*).
Union Transfer Co. (*36 id., 216, 227*).
Slavens (*38 id., 547, 586*).

The contract fully covered the contingency of increase or decrease in quantity and volume of service, the compensation, in either case, to remain unchanged.

If, notwithstanding the express provisions of the contract, the United States is permitted to arbitrarily terminate its obligation and agreement, simply because the service has been decreased 20 per cent. and it wishes to avail itself of a saving to that extent, in the compensation fixed by the contract; does it not logically lead to the conclusion and result that the United States, in the same way, and for the same purpose, could relieve itself of any similar contract where there had been no decrease in service, but some other mail contractor is willing to perform the contract service at a lower rate of compensation?

This is clearly indicated in the opinion of the court below rendered in the Slavens case, (*supra,*) and, without repetition, adopted as its opinion in this case, (the two cases having been consolidated and tried together,) wherein it is stated:

> "The service had been rightfully decreased, under the stipulations of the contracts, until the services remaining to be performed were not reasonably worth

> the original contract rate, and to have continued its payment would have been contrary to public interests, and while claimant was under no obligation to continue in the service at a reduced rate, the head of the department was obligated, as well by the duties of his high office as the provisions of the contract, to subserve the public interests in taking care that no unreasonable compensation was paid for the services actually performed" (*R., 11*).

The contract, in unambiguous and explicit terms, fixed the obligations of each party; the contractor expended $500 in preparing his equipment for the performance of the work; he was, at all times, able, ready, and willing to perform the service, and so repeatedly tendered himself to appellee, but was by it prevented from such performance, not because of any neglect or default on the part of the contractor, but because the service was decreased 20 per cent. in quantity and volume.

The duty of the Postmaster General was fully discharged and performed, and the public interests were properly subserved in taking care that no unreasonable compensation was paid, when the contract was awarded to appellant as the lowest bidder. The terms and provisions of the contract fully safeguarded the interests of the government, giving to it the full benefit of all new, additional, or changed, increased or extended, mail service without any additional compensation.

The history of the Post-Office Department, even as disclosed in the comparatively few suits that have been brought in the Court of Claims, growing out of the transportation of mails in the cities of the United States, establishes the fact that mail service steadily *increases* in volume, instead of decreases; and that the provision requiring the contractor to perform such increase without additional compensation is a most liberal and valuable right reserved to the government, and, ofttimes, a most grievous burden upon the contractor.

Nevertheless, that is the obligation, and the government is entitled to strict and full performance by the contractor, regardless of the extent and burden of the increase.

Why, then, is the contractor not entitled to the enforcement of the like provision and right reserved in the contract in his favor, namely, decrease of service without decrease of compensation?

Of the two, that contingency was, as above shown, the most improbable and least likely to happen; the only reason it happened in this case was, that, at or about said period, the Post-Office Department was inaugurating a mail service upon electric street car lines in various cities, in order to expedite city mail dispatches; and, having entered into contract with appellant, upon the faith of which he expended $500 in preparing himself to perform the contract service, appellee concluded to try the experiment in Boston; and this reduced appellant's contract mileage 20 per cent. per annum.

The government then simply took away his contract, and re-let the remaining 80 per cent. service to another, at a lower price.

If appellee saw fit, during the contract term, to *decrease* the amount of service required, whether by the curtailment or partial discontinuance thereof, or by adopting, for a part of the service, some other kind of a mail messenger—for example, an electric street railway line—that was its privilege; but, as the contract expressly stipulated that such decrease in amount of service required should not change or reduce his pay, the contractor was entitled to all benefit and profits, if any, that would result from such decrease in the service required.

As was stated by this court in the case of Railway Company *vs.* United States (*104 U. S., 680, 684, supra*):

> "The government, whatever power it may reserve over its own agreements, cannot impose new contracts upon those with whom it deals."

The appellant had a right to rely upon the terms and provisions of the contract, according to the natural and ordinary meaning of the words used; and he had a right to assume that the covenant to pay a fixed rate of compensation per annum, for the contract period, unaffected by either an increase or decrease in quantity and volume of service required, was equally binding upon the government as upon himself, and that that covenant to pay meant just exactly what it said, nothing more and nothing less.

The government, however, here seeks to create and impose a new contract upon appellant, after breach on its part, by seeking to inject into the contract an extraordinary condition that not only finds no support from anything contained in the contract, but one that is absolutely inconsistent with and repugnant to the contract.

IV.

THE CONTENTION OF THE GOVERNMENT IS UNTENABLE IN LAW.

In defense of its action in this case, the government contends:

(*a*.) That, under section 161, R. S. U. S., the Postmaster General is authorized to make regulations, not inconsistent with law, for the conduct of his Department and its business; and that, therefore, the present contract is, by necessary implication, subject to all regulations so made, in so far as not in conflict with the express provisions of the contract itself.

(*b*.) That, in pursuance of the above authority, the Postmaster General made the following regulation, being section 817 of the Postal Laws and Regulations of 1887 (in force at the time of the making of this contract):

> "The Postmaster General may discontinue or curtail the service on any route, in whole or in part, in

order to place on the route superior service, or whenever the public interests, in his judgment, shall require such discontinuance or curtailment for any other cause; he allowing, as full indemnity to the contractor, one month's extra pay on the amount of service dispensed with, and a *pro rata* compensation for the amount of service retained and continued."

(*c.*) That said regulation, (quoted,) authorized the action of the Postmaster General herein.

(*d.*) That the contract contains provisions authorizing its summary discontinuance; and, further, that the contract is, in terms, made subject to all conditions imposed by law and the several acts of Congress relating to post-offices and post-roads.

(*e.*) That the right to so discontinue the contract has been affirmed by this court, (Garfielde *vs.* United States, *93 U. S., 242*; Railway Co. *vs.* United States, *104 id., 680*;) and, also, affirmed in an opinion by Attorney General Garland, (*19 Ops. A. G., 146*).

Replying to said several propositions, in the order above stated:

(*a.*)

It may be admitted that, under section 161, R. S. U. S., the Postmaster General may make all proper and needful regulations, not inconsistent with law, for the conduct of the business of his Department.

Such reserved power, however, does not authorize or permit the government to discontinue or terminate its contract obligations, where such action is in conflict with the express provisions of the contract itself; nor does it authorize a contract to be interpreted in the light of one section of the postal laws and regulations, as authority for the discontinuance

of the contract, when that section is absolutely repugnant to and inconsistent with the express terms of the contract itself.

(*b.*)

In order to a full understanding of the provisions of the Postal Laws and Regulations of 1887, section 817 of which is claimed by appellee to be determinative of this controversy, and, by necessary implication, or by reference in general terms, to have been incorporated in the contract itself; it may be useful to refer to sections 808, 813, and 817, of those laws and regulations.

Those sections are, as follows:

> "SEC. 808. For what causes contracts may be annulled.
>
> "The Postmaster General may annul a contract for the following delinquencies on the part of the contractor:"

(*Note.*—This section refers only to annulment of contract for failures, delinquencies, etc., and is, therefore, inapplicable to the facts in this case.)

> "SEC. 813. Increase of compensation for increased service.—Compensation for additional service in carrying the mail shall not be in excess of the exact proportion which the original compensation bears to the original service, and when any such additional service is ordered the sum to be allowed therefor shall be expressed in the order, and entered upon the books of the Department; and no compensation shall be paid for any additional regular service rendered before the issuing of such order (*R. S., sec. 3960*).
>
> "SEC. 817. Decreased compensation for decreased service.—The Postmaster General may discontinue or curtail the service on any route, in whole or in part, in order to place on the route superior service, or whenever the public interests, in his judgment, shall require such discontinuance or curtailment for any

other cause; he allowing, as full indemnity to the contractor, one month's extra pay on the amount of services dispensed with and a *pro rata* compensation for the amount of services retained and continued."

(*c.*)

Said section 817 manifestly did not authorize the action of the Postmaster General in this case.

The above sections, (quoted,) it will be observed, provided specifically the causes for which a contract may be annulled, (*Sec. 808*); further, that an *increased* compensation should be paid for an increased service, the increased compensation, however, to be in the exact proportion which the original compensation bore to the original service, (*Sec. 813*); and, further, that the Postmaster General may discontinue or curtail the service on any route, *in whole or in part*, whenever the public interests, *in his judgment*, require such discontinuance or curtailment; in which case one month's extra pay shall be allowed the contractor as full indemnity for the amount of service dispensed with, and a *pro rata* compensation for the amount of service retained and continued, (*Sec. 817*).

It is thus seen that, under the above regulations, the Postmaster General undertook to specifically provide for the carriage of mails under contract, the compensation for which could be increased or decreased (*pro rata*) accordingly as the service increased or decreased; with the further right reserved to discontinue or curtail the service, in whole or in part, and to *pro-rate* the compensation accordingly.

So far as a contract may have been made with direct reference to such regulations, and incorporating in the contract itself such reserved right (as was, in fact, done in the cases below referred to, under sub-paragraph *e*,) there would seem to be no legal objection to giving full effect to the provision; but as will below be shown, no such right was reserved in this case, either by law, regulation, or contract; but, on the

contrary, an entirely different scheme and plan was contemplated, intended, and required from that set forth in the above postal regulations, as will be presently shown.

But it must be remembered that the sections of the Postal Laws and Regulations referred to are, in terms, directed to the transportation of mails by railroad, steamboat, and star routes, where, because of the fact that the compensation is fixed upon a mileage basis, (as in the case of Chicago, etc., Ry. Co. *vs.* United States, *supra*, where the fixed price per annum was at the rate of a specified sum per mile,) an adjustment of compensation may be readily estimated upon a mileage basis and prorated according to the increase or decrease in the mileage.

This contract is one relating to a covered screen wagon mail messenger, transfer, and mail station service, in the city of Boston; and said sections of the Postal Laws and Regulations do not even profess to have any relation thereto.

The service under a contract covering mail messenger, transfer, and mail station service (to which class the present contract belongs), is essentially different from a railroad, steamboat, or star-route service, which as shown is placed and estimated upon a mileage basis, and an increase or decrease in mileage prorated. Here however, as in other wagon mail messenger, transfer, and mail station service, the contract requires the performance, without additional compensation, of all new or additional or changed covered screen wagon mail station service that may be ordered of him during the contract term, whether caused by change of location of post-offices, stations, landing, or the establishment of others than those existing at the date of the contract, or rendered necessary, in the judgment of the Postmaster General, for any cause, and to furnish advance or extra wagons for special or advance trips; that schedules may be changed, as well the termini of the route, and that routes may be varied, increased, decreased, or extended without change of pay.

Thus the wagon mail messenger service in a city is of an essentially different kind from that of a railroad, steamboat, or star-route service; the two are not governed by the same sections of the Postal Laws and Regulations; and the contract requirements of each said service are necessarily distinctly different.

This, of course, entirely accounts for the radical difference between the scheme and plan of a railroad, steamboat, and star-route service and contract, which permits a re-adjustment and prorating of compensation, and the present contract for a covered screen wagon mail messenger, transfer, and mail station service, which contains a fixed rate of compensation, permitting of no change either way, for either increase or decrease.

(*d.*)

The contract contains no provisions which in any way permitted or authorized its summary termination.

It must be borne in mind that the regulations above quoted are not found in any act of Congress authorizing the making of contracts for carrying the mails, and providing various of the detail matters in connection therewith. The supposed right here asserted by appellee cannot be found in the statutes; it cannot be found in any postal regulations having any application to this contract; and it cannot be found in the contract itself.

The "Instructions to bidders," accompanying the advertisement for proposals, and under which appellant submitted his bid and proposal, contained no reference whatever to the above regulations; but, on the contrary, appellant, as a prospective bidder, was therein and thereby notified that an entirely different scheme and plan was contemplated, intended, and required from that set forth in said postal regulations, and one too that was infinitely more onerous and burdensome to the contractor than under the former plan,

namely, that here there should be no increase or decrease of compensation, *pro rata* or otherwise, for either increase or decrease of service; and, instead of providing for a discontinuance or curtailment of service, *in whole or in part*, (as in said postal regulations, *supra*,) it provided only for a *total* discontinuance.

A reading of said "Instructions to bidders," in this regard, leaves no room for doubt:

> "There will be no diminution of compensation for partial discontinuance of service or increase of compensation for new, additional, or changed service that may be ordered during the contract term; but the Postmaster General may discontinue the entire service on any route whenever the public interests, in his judgment, shall require such discontinuance, he allowing, as full indemnity to the contractor, one month's extra pay" (*R.*, *14*).

And, again, the contract itself expressly stated the covenant and agreement between the parties in this regard:

> "It is hereby stipulated and agreed by the said contractor and his sureties that the Postmaster General may change the schedule and termini of the route, vary the routes, increase, decrease, or extend the service thereon, without change of pay; and that the Postmaster General may discontinue the entire service whenever the public interest, in his judgment, shall require such discontinuance; but for a total discontinuance of service the contractor shall be allowed one month's extra pay as full indemnity" (*R.*, *7*).

This, it will be observed, was an entirely different plan from, as well utterly inconsistent with, that which was formerly provided for by the postal regulations; there a sliding scale of compensation was provided, as the service either increased or decreased, and authorized a discontinuance or curtailment of service, *in whole or in part*, and a readjusted *pro rata* com-

pensation; whereas, here, those provisions were entirely abandoned, and the parties mutually undertook to perform, on the one hand, and to pay, on the other, *all* the service, be it greater or less, *without any change of pay;* and further, only authorized a discontinuance of service when it was *total.* A change either way was to be absolutely without change of pay, and the only right reserved to the Postmaster General, as to the termination of the contract during the term of its existence was for the *total* discontinuance of the *service.*

Hence, it necessarily follows that neither of the above, nor any other, sections of the postal laws and regulations has, nor can have, any application whatever to this contract.

Furthermore, the action herein complained of finds no support in the provision contained in the contract—

> "and that the Postmaster General may discontinue the *entire service* whenever the public interest, in his judgment, shall require such discontinuance; but, *for a total discontinuance of service,* the contractor shall be allowed one month's extra pay as full indemnity" (*R.*, 7).

To say that the expressions "may discontinue the entire service," and "a total discontinuance of service," are the legal equivalents of a discontinuance of the *contract* itself, is not only to place it in the power of the Postmaster General to abrogate, at will, any such existing contract, and thus convert it into an unilateral agreement, binding alone on the contractor, and only optional and discretionary with the Postmaster General; but such holding would be utterly at defiance with, as well ignore, the express and solemn covenant, binding alike on both parties, that mere increase or decrease in quantity and volume of service should not affect or change the compensation fixed by the contract.

Here there was, in fact, no discontinuance of service, entire or otherwise, but only a partial *decrease* of service, to wit, 20 per cent. per annum; and that part of the service,

was simply transferred from a screen-wagon mail messenger to an electric street car mail messenger.

The extraordinary right asserted by appellee in this case finds no support in the decisions of the lower court or of this court, in other cases:

Thus, in the case of Stevens, (*2 C. Cl., 95, 103*), the Secretary of War undertook to require the acceptance, by a contractor, of a less sum of money than the contract price, but he declined so to do; and it was held:

> "This unilateral action of the Secretary of War is not obligatory upon the claimant, and he should nevertheless recover the full amount of his voucher."

So, also, in the case of Mason (*6 id., 57*), the Secretary of War undertook to require the contractor to accept a modification of his contract, in the matter of compensation, or else to renounce the contract. The contractor elected to accept the former alternative, and, accordingly, permitted a modification of the agreement. He afterwards, however, endeavored to enforce, by suit in the Court of Claims, his contract rights as to compensation; and that court, while recognizing and sustaining his right to have stood upon his legal rights, as in the Stevens case (*supra*), yet, having elected to modify his agreement, and having accepted that modification, he was bound by such election.

Again, in the case of Railway Co. *vs.* United States (*104 U. S., 680, 685*), it was held, in respect of a contract with the government for carrying the mails, that it can only be annulled, discontinued, or lessened, as provided in the contract itself, and can be changed in no other way, "except by the mutual assent of the parties."

(*c.*)

And, finally, appellee contends that the right asserted and exercised herein by the Postmaster General finds support in the decisions of this court (Garfielde *vs.* United States, *93 U. S.*,

249, and Railway Co. *vs.* United States, *104 U. S., 680*), and in an opinion of Attorney General Garland (*19 Ops. A. G., 147–8*).

(1.) The Garfielde case.

In that case, claimant had submitted a formal proposal and bid for conveying the United States mail, by steamboat, between Port Townsend, Washington, and Sitka, Alaska; his proposal was made expressly subject to the laws and instructions attached to the advertisement of mail service. Among such instructions and regulations, was section 263, relating to mail transportation on steamboat and star routes (as it was designated prior to the revision of 1887, but being precisely the same regulation designated in the revision of 1887 as section 817). It will not be necessary to here quote said section 263, it having been already quoted above, as section 817.

Said claimant's bid was accepted, but, before any formal written contract had been signed by the parties, the acceptance thereof was revoked; and he, thereafter, brought suit in the Court of Claims, to recover loss of profits sustained by breach of contract.

That court, however, held, that no valid contract existed, because claimant's proposal did not strictly follow the service advertised:

> "The Postmaster General, having erred in accepting the bid of the claimant, had a right and it was his duty to correct his error. His act in accepting the claimant's bid was in violation of law, and of no force and effect, and the petitioner acquired no rights thereby.
>
> "The judgment of the court is that the petition be dismissed" (*11 C. Cl., 592, 605*).

The decision of the lower court, in that case, did not pass upon the question of the right of the Postmaster General to arbitrarily terminate the contract.

On appeal, this court held that, under said facts, a contract existed, but it sustained the right and power to so terminate the contract, because of said section 263 (*section 817, supra*), which was made and held to be a part of the contract itself.

In the opinion, this court stated :

> " The claimant states, in his proposal, that he has full knowledge of the laws and regulations of the Department on the subject of mail transportation. He no doubt knew that this regulation provided that the Postmaster General could discontinue entirely the service for which he proposed, whenever, in his judgment, the public interests required it, and that, for such discontinuance, one month's pay was to be deemed a full indemnity to the contractor " (*p. 246.*)

That case, therefore, turned upon the express contract provision of section 263, authorizing a discontinuance or curtailment of service, in whole or in part, and the *pro-rating* of compensation; but, as has been above shown, that section has application only to transportation on steamboats and star routes, where the service can be readily estimated upon a mileage basis, and pro-rated according to an increase or decrease in the mileage.

Such a service is totally different in every essential and particular from the covered screen wagon mail station service in a city, like that here under consideration.

And, furthermore, the express provisions of this contract make absolutely impossible the re-adjustment of compensation upon a *pro-rata* basis, increase or decrease.

In the Garfielde case, there was involved the scheme or plan of a re-adjusted compensation, upon a pro-rated mileage basis, in the proportion of the mileage increased or decreased; whereas, in the present case, there is involved the entirely different scheme or plan of a definite and fixed compensation that may be neither changed nor pro-rated for any increase or decrease of service.

The decision in that case, therefore, is not here controlling.

(2.) The Chicago and Northwestern Railway Co. case.

That case involved a contract for transporting the mail on a railroad, for a period named, and at a fixed price per annum, being at the rate of a specified sum per mile. The contract contained the same section 263 (section 817, *supra*), as in the Garfielde case.

Thereafter, an act of Congress undertook to authorize the Postmaster General to re-adjust the compensation to be paid for transportation of mails on railroad routes; and, accordingly, such re-adjustment was attempted by a reduction from the rate fixed in the contract, but the company declined to submit thereto, and brought suit to recover the unpaid amount.

This court, while sustaining the right of the Postmaster General to re-adjust and pro-rate compensation, for an increased or decreased mileage, where the contract contains a provision of that kind (as it there did), and where the service was based upon that scheme and plan (as it there was), proceeds to state the law applicable to the relative rights of the parties to such mail contracts, as follows:

> "The power to establish the price included the power also to declare the period of its duration; and if it be said that any contract which fixes both the price and its duration must be construed as subject to the continuous control of the power which made it, it must also be admitted that no change can be made without the abrogation of the contract. The government, whatever power it may reserve over its own agreement, cannot impose new contracts upon those with whom it deals. * * * It certainly cannot retain the obligation of the contract as against the company, and, at the same time, vary its own, unless it has reserved the right to do so in the contract itself.
>
> * * * * * * *

> "They (the contracts) were, therefore, valid and binding on the United States as well as upon the railroad company. They contained, within themselves, the mode for lessening, or, if deemed best, for discontinuing entirely, the described service; and provided for a proportionate reduction of the stipulated compensation. In no other mode could the contract be changed, except by the mutual assent of the parties. Any attempted change by either, otherwise, would have been merely a breach of the agreement; and the United States would have been liable to damages for its breach, on the same principles and to the same extent as a private party, for which a suitable remedy was provided by law in the jurisdiction conferred upon the Court of Claims. In this respect, the relation between the parties was that of perfect equality in right" (*pp. 684–5*).

It was, however, held that the government had no right to change the contract, and impose upon the contractor the performance of the service at a compensation other than that fixed in the contract; and that such contract could only be annulled, discontinued, or lessened, as therein provided, and can be changed in no other way, "except by the mutual assent of the parties."

That case, therefore, instead of supporting the contention of appellee, really establishes the unsoundness thereof; and, furthermore, as above shown, the contract there under consideration was an entirely different contract from the present.

3. The opinion of Attorney General Garland.

In that case, the contract under consideration embodied the very words of said section 817 (*supra*), and, in addition, used the words that the Postmaster General might discontinue or extend the *contract* (using said word contract, instead of limiting the right reserved to the *service* merely).

In the opinion, the Attorney General comments upon the substitution, in the contract itself, of the word "contract"

for the word "service;" and concludes that the right so reserved to the Postmaster General, as contained in the contract, could be lawfully exercised by discontinuing the "contract" during its term. In support of his opinion he cites the Garfielde case (*supra*).

The above considerations dispose of the cases urged in support of the position of appellee; the decision in each said case being based upon the fact that the regulation and authority, conferred by said section 817, was found in and expressly made a part and condition of the very contract itself.

Here, no such regulation was made a part of the contract, either by implication, reference, expression, or otherwise. On the contrary, the regulation is so utterly inconsistent and at variance with the conditions of the contract that the two cannot possibly stand together.

How can a regulation (section 817) authorizing a re-adjustment of compensation upon a *pro-rata* basis, for an increased or decreased mileage, consist with the express provision of this contract that the compensation shall be neither increased, diminished, nor changed, for an increase or decrease in service?

It is utterly impossible to apply section 817 to this contract.

Therefore, if the compensation may not be changed because of an increase or decrease of mileage, surely the contractor may not lawfully be deprived of his contract and of *all* compensation because of such decrease.

V.

THE JUDGMENT BELOW IS ERRONEOUS AND SHOULD BE REVERSED.

From what has now been shown, it results that the action of the Postmaster General, herein complained of, was without lawful authority or right, and constituted a breach of contract, for which the government is answerable to appellant.

The loss sustained by appellant by reason of the breach, as found by the court below, is $5,500 (*R.*, *9*), and for that sum he is entitled to judgment.

It is respectfully submitted that the judgment below should be *reversed*, and that judgment should be directed to be entered in favor of appellant, and against appellee, in the sum of $5,500.

A. A. HOEHLING, JR.,
Attorney for Appellant.

WASHINGTON, D. C.,
November 19, 1904.